CHAPTER 7

PREGNANCY, CHILDBIRTH AND RELATED MEDICAL CONDITIONS

LEGAL STANDARDS FOR PREGNANCY, CHILDBIRTH AND RELATED MEDICAL CONDITIONS

A. Introduction

In California, it is unlawful for an employer, because of pregnancy, to:

1. Refuse to hire or employ a job applicant;
2. Refuse to select an applicant or employee for a training program leading to employment or promotion;
3. Refuse to promote an employee;
4. Bar or discharge an applicant or employee from employment or a training program leading to employment or promotion;
5. Refuse to provide health benefits for pregnancy if the employer provides such benefits for other temporary disabilities;
6. Discriminate against an applicant or employee in the terms, conditions or privileges of employment;
7. Harass an employee or job applicant because of pregnancy;
8. Retaliate against an employee because of pregnancy or because the employee has exercised her right to take a pregnancy disability leave or transfer;
9. Otherwise discriminate against any applicant or employee because of on the basis of sex;
10. Deny a woman who is disable on account of pregnancy her right to take pregnancy disability leave;
11. Fail to grant a pregnant woman a reasonable accommodation, which will allow her to perform the essential functions of her position;
12. Fail to transfer a woman to a less strenuous or hazardous position during her pregnancy;
13. Fail to return a woman to her same position following pregnancy disability leave;
14. Fail to return a woman to a comparable position following pregnancy disability leave if the employer is legally excused from returning her to the same position.[1]

Pregnancy cases generally involve allegations that the respondent took some form of adverse action against the complainant because of pregnancy, childbirth or related medical conditions.

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[1] Government Code sections (Gov. Code, §§) 12926, subdivision (subd.) (o); 12940, subds. (a)-(f), (h), (j), (k); 12945; California Code of Regulations, title 2, sections (Cal. Code Regs., §§) 7291.3, 7291.4, 7291.5, subdivisions (subd.) (a), (c), (d).

Claimed disparate treatment and denial of leave or failure to reinstate following leave are the two most typical Fair Employment and Housing Act (FEHA) pregnancy cases. In a disparate treatment case, the employee asserts that she was treated differently than others not affected by pregnancy, childbirth or related medical conditions, and alleges that there is a causal connection between the adverse treatment and her sex or pregnancy. In such cases, pregnancy or sex need not be the sole or even dominant reason for the adverse treatment. Discrimination is established if sex or pregnancy was at least one of the factors that influenced the employer's action.[2]

When a complainant alleges that she was denied reinstatement to her employment following pregnancy disability leave, the employer often admits the causal link, i.e., that the complainant was not reinstated to her employment "because of" her pregnancy, but contends that the failure to reinstate is excused by a legally recognized affirmative defense. Thus, the key question in denial of leave cases is often whether or not the employer can produce sufficient evidence in support of the claimed affirmative defense.[3] Regulations issued by the Fair Employment and Housing Commission (FEHC) are narrowly drawn and will excuse an employer's failure to reinstate only in those few situations where reinstatement is not required due to business reasons unrelated to the woman's pregnancy.[4]

B. Evolution and Expansion of the FEHA's Pregnancy Provisions

The FEHA and its implementing regulations have prohibited pregnancy discrimination for at least several decades.[5]

Amendments to the FEHA and FEHC Regulations in the early and mid-1990s clarified and expanded the rights of women affected by pregnancy, childbirth or related medical conditions. For example, in 1993, a pregnant woman's right to transfer to a less strenuous or hazardous position upon the advice of her health care provider, so long as the transfer can be reasonably accommodated, was

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[2] *DFEH v. Seaway Semiconductor, Inc.* (2000) FEHC Dec. No. 00-03 at p. 11; *DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. No. 90-06, at p. 6; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290 [overruled on other grounds]; *DFEH v. Raytheon Company* (1989) FEHC Dec. No. 89-09, at pp. 15-16, *decision affd*., *Raytheon Co. v. Fair Employment & Housing Commission* (1989) 212 Cal.App.3d 1242.

[3] *DFEH v. Wal-Mart Stores, Inc.* (2005) FEHC Dec. No. 05-04 at p. 8; *DFEH v. Stone Insurance Services, Inc.* (1999) FEHC Dec. No. 99-11 at p. 5.

[4] Cal. Code Regs., tit. 2, § 7291.9, subd. (c); see also *DFEH v. Wal-Mart Stores, Inc. (2005*) FEHC Dec. No. 05-04 fn. 2 at p. 16.

[5] Government Code section 12945 was originally codified in Labor Code section 1420.35 in 1978. The FEHC's first pregnancy Regulations were issued in 1980, and revised in 1987 and 1995 (see "History" section following the current (1995) version of the Regulations, Cal. Code Regs., tit. 2, § 7291.2).

established.[6] That same year, the law established that pregnant employees who qualify for leave under the Family Medical Leave Act (FMLA)[7] are entitled to continue receiving health care benefits for the first 12 weeks of pregnancy disability leave to the same extent as if they had never taken leave.[8]

In 1994, the FEHA was amended to clarify that "harassment because of sex" includes sexual and gender harassment, as well as harassment based on pregnancy, childbirth and related medical conditions.[9]

In 1995, the FEHC's Regulation s were dramatically revised to clarify the law and conform the terms used to those used in CFRA, as well as FMLA Regulations. For example, the term "original" position was changed to "same" position and "substantially similar" job was changed to "comparable" job.[10] Additionally, some of the affirmative defenses were modified,[11] new notice and posting requirements were established,[12] and specific prohibitions against harassment and retaliation were added.[13]

Assembly Bill (AB) 1670 (Committee on Judiciary), Chapter 591, enacted in 1999, made it an unlawful employment practice for an employer, including both employers subject to and not subject to Title VII of the federal Civil Rights Act of 1964,[14] to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth or related medical conditions, if she so requests, with the advice of her health care provider.[15]

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[6] See former Gov. Code, § 12945, subd. (c)(2). Note: Prior to this amendment, if an employer did not have a policy, practice or collective bargaining agreement that provided for such transfers, only small employers (non-Title VII employers, those having between 5 and 14 employees) were required to transfer pregnant women to less strenuous or hazardous positions.

[7] The federal Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. and FMLA Regulations, Code of Federal Regulations, title 29, part 825, require employers having at least 50 employees to provide a leave of absence for "serious health conditions" to eligible employees. The leave of absence may not exceed 12 workweeks in a 12-month period. Unlike the CFRA, FMLA treats pregnancy-related disabilities as "serious health conditions." (See detailed discussion in Chapter entitled "California Family Rights Acts (CFRA).")

[8] See Gov. Code, § 12945.2, subd. (f)(1) [added by A.B. 1460 (Statutes of 1993)].

[9] See Gov. Code, § 12940, subd. (j)(4)(c).

[10] Cal. Code Regs., tit. 2, § 7291.2, subds. (i) and (j).

[11] Cal. Code Regs., tit. 2, § 7291.9, subds. (c)(1)(A), (c)(2)(B).

[12] Cal. Code Regs., tit. 2, § 7291.16.

[13] Cal. Code Regs., tit. 2, §§ 7291.3 and 7291.15.

[14] Title VII of the 1964 Civil Rights Act prohibits discrimination on the basis of, inter alia, sex and pregnancy, and its coverage is limited to employers having fifteen (15) or more employees. (42 U.S.C. § 2000(e) et seq.) In 1978, the Pregnancy Discrimination Act was added to Title VII.

[15] Gov. Code, § 12945, subd. (b)(1).

In 2004, AB 2870 (Mullin), Chapter 647, was signed into law, and became effective January 1, 2005. That legislation amended the provisions of the FEHA related to pregnancy disability leave and reconciled them with the general sex discrimination provisions of the FEHA. Prior to 2005, Government Code section 12945 applied almost exclusively to small employers, i.e., those having between five and 14 employees. The FEHA referred to them as "non-Title VII employers." The only portions of Government Code section 12945 that applied to Title VII employers were those related to pregnancy disability leave and the obligation to transfer a pregnant employee to a less strenuous or hazardous position. In light of AB 2870, the protections applicable to female California employees are no longer differentiated by whether she works for a "non-Title VII employer" or "Title VII employer."

C. Jurisdiction

The FEHA's pregnancy provisions apply to California "employer[s]," as that term is defined in Government Code section 12926, subdivision (d):

> "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:
>
> "Employer" does not include a religious association or corporation not organized for private profit.[16]

The provisions also apply to all other "covered entities," as explained in the FEHC's Regulations:

> A "covered entity" is any person (as defined in Government Code section 12925, subdivision (d)),[17] labor organization, apprenticeship training program, training program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of Government Code sections 12940, 12943, 12944 or 12945 apply.

There is no length of service requirement before an employee may exercise her right(s) related to pregnancy, childbirth or related medical condition(s), such as, for example, taking a pregnancy disability leave.[18]

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[16] See Gov. Code, § 12926.1.

[17] "Person" includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries. (Gov. Code, § 12925.)

[18] Cal. Code of Regs., tit. 2, § 7291.7, subd. (c).

If the complainant alleges that she has been subjected to unlawful harassment because of her pregnancy, in order for DFEH to have jurisdiction over the complaint, it must establish that there existed an employment relationship. In the case of harassment, it is sufficient to establish that the person or entity had one or more employees.[19]

D. Elements of the Prima Facie Case of Discrimination

In all instances, in order to establish that a violation of the FEHA has occurred, the complainant must have had one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition.

Alternatively, the complainant may have been *perceived* by the respondent as having one of those three conditions.

Additionally, as discussed above, the respondent must be an "employer," as defined in the FEHA.

1. Pregnancy Discrimination

Pregnancy discrimination is shown if the evidence establishes the above two elements, as well as:

a. The respondent took adverse action (e.g., refused to hire, terminated, demoted the complainant);

b. There is a causal nexus between the complainant's pregnancy and the adverse action taken.

The key is the "causal nexus" or "causal connection." If the complainant's pregnancy was *a motivating factor* in the respondent's decision to take an adverse employment action against her, the requisite connection exists. As discussed above, the complainant's pregnancy need not be the sole or dominant factor/motivation for the respondent's action. Even though other, nondiscriminatory reasons motivated the respondent's action, the legal showing is made so long as it is demonstrated, by a preponderance of the evidence, that the complainant's pregnancy was at least one factor in the decision.

c. No affirmative defense excuses the respondent's conduct.

[19] Gov. Code, § 12940, subd. (j)(4)(a).

2. Denial of Pregnancy Disability Leave, Reasonable Accommodation or Transfer to a Less Strenuous or Hazardous Condition

A prima facie case showing that the FEHA was violated is established if the evidence demonstrates the above two factors, as well as:

a. The employee was disabled by pregnancy or provided certification from her health care provider of her need for leave, reasonable accommodation or transfer to a less strenuous or hazardous position.

b. The employee's request was reasonable.[20]

c. The employer denied the employee's request.

d. No affirmative defense excuses the respondent's conduct.

3. Failure to Reinstate Employee to Same Position (or Comparable Position) Following Pregnancy Disability Leave or Transfer to a Less Strenuous or Hazardous Position

A prima facie case showing that the FEHA was violated is established if the evidence demonstrates the above two factors, as well as:

a. The employee was granted a pregnancy disability leave or transfer to a less strenuous or hazardous position for the duration of her pregnancy.

b. At the conclusion of the employee's pregnancy disability leave or need for transfer to a less strenuous or hazardous position, the employer refused to reinstate the employee to her same position.

c. Either no affirmative defense excuses the employer's conduct; or an affirmative defense excuses the employer's failure to reinstate the employee to the same position, but demonstrates that the employer was required to reinstate her to a comparable position, but refused.

E. Discrimination and Harassment Because of Pregnancy

Discrimination because of pregnancy is prohibited by Government Code section 12940, subdivision (a), which prohibits discrimination because of sex in the selection, termination, and terms and conditions of employment.

Government Code section 12926, subdivision (p), states that "'[s]ex' includes, but is not limited to, pregnancy, childbirth or medical conditions related to pregnancy or

[20] A request is "reasonable" if it complies with applicable notice requirements and is accompanied, where required, by a certification from the employee's health care provider. (Cal. Code Regs., tit. 2, § 7291.8, subd. (c).)

childbirth. 'Sex' also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code."

Government Code section 12945, subdivision (c), recognizes that the sex provisions of Government Code section 12940, subdivision (a), embody pregnancy discrimination. It states:

> This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of this part, including subdivision (a) of Section 12940.

Government Code section 12940, subdivision (j)(4)(c), recognizes that pregnancy-related harassment is sex discrimination: "For purposes of this subdivision, "'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth or related medical conditions."

Finally, the FEHC's Regulations provide:

> Discrimination by employers because of pregnancy constitutes discrimination because of sex under Government Code sections 12926, subdivision [(p)] and 12940, subdivisions (a), (d), (f), (g), (h) and [(j)].[21]

In order to prove sex discrimination, along with discrimination because of pregnancy, childbirth or related medical conditions, it must be shown that the employer "treated the complainant differently than it treated similarly situated, non-pregnant employees who were also temporarily disabled."[22]

> *Example: A certified nurse's aide performed duties that included lifting and moving patients who weighed 150 pounds or more, distributing meals and feeding patients, taking patients' vital signs, and recording patients' food intake. She submitted her health care provider's certification to her employer and requested a "light duty" assignment for the duration of her pregnancy. The employer had a policy and practice of granting light duty assignments to certified nurse's aides who sustained injuries on or off the job. Nonetheless, the employer refused the employee's request, stating that it did not provide light duty assignments to pregnant women. As a result of the employer's failure to give the employee a light duty assignment, her physician advised*

[21] Cal. Code Regs., tit. 2, § 7291.5. Note that the FEHC's Regulations have not been updated since 1995. Therefore, the statutory reference to Government Code section 12926, subdivision (o), should be to subdivision (p), while the reference to section 12940, subdivision (i), should be updated to point to subdivision (j).

[22] *DFEH v. Wal-Mart Stores, Inc.* (2005) FEHC Dec. No. 05-04, at p. 9.

she should begin her pregnancy disability leave. When the employee requested leave, the employer terminated her employment.

The FEHC found that the employer's refusal to treat the pregnant employee in the same way that it treated other temporarily disabled employees constituted a denial of "equal terms, conditions and privileges" of employment, i.e., the employer had engaged in discrimination because of sex in violation of Government Code section 12940, subdivision (a).[23]

Example: A female police officer alleged that she was denied promotion to the rank of Captain because of her gender and/or pregnancy. The employer/police department contended that it had a legitimate, nondiscriminatory business reason for not promoting her: A hiring freeze was in place and the department was in the process of being reorganized. In support of its contentions, the employer submitted declarations to the court executed by the Chief and Deputy Chief. However, the police department submitted no other written documentation substantiating that a hiring freeze was effected. Rather, the evidence showed that the hiring freeze was implemented merely by word of mouth. The court ruled that the police department did not submit sufficient evidence to rule out the possibility that the hiring freeze was merely a pretext designed to mask a discriminatory motive.[24]

Example: The evidence showed that a female employee progressed in her employment with a hotel corporation, receiving promotions and raises, until she was assigned to a new supervisor while seven months pregnant. On the supervisor's third day of employment, he told the employee that the hotel kitchen was "no place for a pregnant woman to be" and remarked to other employees that pregnant women should not be working in the hotel or restaurant business. He stated that "it didn't look good" for a pregnant woman to be working at the front desk of the hotel where the employee was assigned, made derogatory comments about women being strong-willed and outspoken, disparaged the employee's performance and engaged in acts designed to deliberately sabotage her ability to competently perform her duties. The employee complained to the hotel's general manager of the supervisor's conduct. Nonetheless, the employee was fired. The employer contended that the termination was based upon a legitimate, nondiscriminatory business reason, i.e., the employee's inability to "get along with" her supervisor.

The jury rejected the employer's contention and the appellate court concurred. The employer did not present evidence that the employee was

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[23] *DFEH v. Care Net Fullerton, L.P., dba Harbor Health Care* (1994) FEHC Dec. No. 94-07.

[24] *Glenn-Davis v. City of Oakland* (2005) 2005 WL 2373725, slip copy. The court refused to grant the City of Oakland Police Department's motion for summary judgment which would have concluded the lawsuit in its favor.

fired for a legitimate, nondiscriminatory reason. The employee was discriminated against both on the basis of her sex (female) and pregnancy in violation of Government Code sections 12940, subdivision (a), and 12945. [25]

Example: Following pregnancy disability leave, a Rehabilitation/Chiropractic Assistant III was not reinstated to her same position. She was reassigned to the position of "floater," denied access to the desk to which she had been assigned prior to taking leave, prohibited from performing tasks such as working at the front desk that she had performed competently prior to taking leave, and the employer attempted to transfer her from its Stockton location, granting her the "option" to work in either its Sacramento or Modesto office until she protested the reassignment. She was the only employee purposefully excluded from staff meetings, although she had regularly attended them prior to taking pregnancy disability leave. The employer's management criticized the employee's appearance and voice, accused her of not getting along with other employees, and retained the employee who had performed her duties while she was on leave, allowing that employee to perform her duties while she was relegated to being a "floater," i.e., assisting her replacement. The employee repeatedly requested a meeting with the employer's administrative director. Instead, she was contacted by the bookkeeper about retrieving her final paycheck since the employer had terminated her employment.

The FEHC found that the employer violated Government Code section 12940, subdivision (a), because there was a causal connection between the employee's pregnancy and the adverse actions to which she was subjected by the employer. The employee's pregnancy need not be the sole or dominant factor, but merely one of the factors that motivated the employer's behavior. In this case, the evidence established that the employer never seriously intended to reinstate the employee to her same position at the conclusion of her pregnancy disability leave. Rather, it was the employer's intent not to allow complainant to resume her same position and duties, as shown by management's conduct. The administrative director ignored the employee's calls requesting a meeting, instead directing the bookkeeper to forward her final paycheck. All of the above actions were connected to the employee taking a pregnancy disability leave and, accordingly, violated the rights granted by the FEHA to pregnant employees. [26]

F. Conditions That Qualify for Protection Under the FEHA

As noted above, the FEHA's provisions encompass pregnancy, childbirth and related medical conditions.[27]

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[25] *Carr v. Barnaby's Hotel Corp.* (1994) 23 Cal.App.4th 14.

[26] *DFEH v. Maxpractice Clinic Management, Inc.* (1997) FEHC Dec. No. 97-09.

[27] Gov. Code, § 12945, subd. (a). Note that the definition of "medical condition" used when discussing the FEHA's provisions related to pregnancy, childbirth and related "medical

A "related medical condition" is any medically recognized physical or mental condition that is related to pregnancy or childbirth.[28]

> *Example: A female employee was terminated from her employment as a part-time cashier in a discount store. She was denied a leave of absence for a "diagnostic hysterectomy" and her employment terminated on the ground that she had not worked enough hours to qualify for medical leave.[29] The employee contended that she was subjected to discrimination in violation of Government Code section 12945, arguing that the statute's reference to "related medical conditions" should be construed broadly enough to include any medical condition involving a woman's reproductive organs, thus, a hysterectomy should be included within the statutory protection provided women because it ends a woman's ability to be pregnant. She further claimed that the hysterectomy was required because she suffered a miscarriage, although she had given birth to a child several years before the surgery. She admitted that she "was not pregnant" at the time she requested leave and "neither 'pregnancy' nor 'childbirth'" were directly involved.*
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> *The court rejected her contentions, noting that the FEHA and its federal counterpart share a common goal: "to end discrimination against pregnant workers." The plain language of the statute controls: In order to prevail on a claim of discrimination because of medical condition under Government Code section 12945, the medical condition must be connected to pregnancy or childbirth, i.e., the condition must flow directly therefrom.[30]*

"Because of pregnancy" includes an employer or other covered entity's *perception* that a woman is pregnant or has a related medical condition.[31] Thus, *perceived* pregnancy or related medical condition is covered by the FEHA.[32]

G. Protections Afforded by the FEHA

1. Pregnancy Disability Leave

A woman is "disabled" by pregnancy, childbirth or related medical condition(s) if:

- She is unable to work at all; or

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conditions" differs from the definition set forth in Government Code section 12926, subdivision (h).

[28] Cal. Code Regs., tit. 2, § 7291.2, subd. (p).

[29] Although the court did not expound on this point, it may be assumed that the reference to "medical leave" means leave in accordance with the CFRA.

[30] *Williams v. MacFrugal's Bargains-Close-Outs, Inc.* (1998) 67 Cal.App.4th 479.

[31] Cal. Code Regs., tit. 2, § 7291.2, subd. (c); former Government Code section 19245.

[32] Cal. Code Regs., tit. 2, § 7291.2, subd. (c).

- She is unable to perform any one or more of the essential functions of her job; or

- She is unable or to perform one or more of the essential functions of her job without undue risk to herself, the successful completion of her pregnancy or to other persons.

She is also considered "disabled" if she is suffering from severe "morning sickness" or must take time off work for prenatal care.[33]

The FEHA requires California employers to allow female employees who are "disabled by pregnancy, childbirth or related medical conditions to take a leave for a reasonable period of time not to exceed four months and thereafter return to work, as set forth in the Commission's Regulations."[34]

a. Proof of Disability

A "health care provider"[35] is:

1) An individual holding either a physician's and surgeon's certificate or an osteopathic physician's and surgeon's certificate issued pursuant to the relevant provisions of the California Business and Professions Code;

2) Any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the pregnancy, childbirth or related medical condition;

3) Any other persons, including nurse practitioners, nurse midwives, or others who meet the definition of "others capable of providing heath care services" under the federal Family Medical Leave Act and its implementing regulations.[36]

As a condition of granting a pregnancy disability leave an employer may require an employee to submit certification that she is disabled so long as the employer has provided its employees with notice of such requirement and pregnant employees in need of disability leave are

[33] Cal. Code Regs., tit. 2, § 7291.2, subd. (g).
[34] Gov. Code, § 12945, subd. (a); Cal. Code of Regs., tit. 2, § 7291.2, sub. (o).
[35] The term "health care provider" did not appear in the 1987 version of the FEHC's Regulations. Thus, decisions rendered prior to promulgation of the 1995 Regulations use the terms "doctor" and "licensed health care practitioner" instead of the current term "health care provider."
[36] Cal. Code Regs., tit. 2, § 7291.2, subd. (m); 29 C.F.R. § 825.118.

treated in the same manner as similarly situated employees with other form(s) of disabilities.[37]

> *Example: An employee was disabled as a result of pregnancy and so advised her immediate supervisor in person on October 26. She was instructed to provide written documentation, but not by a date certain. Within two days, she had requested written certification from her physician and he transmitted it to the employer on November 2. To justify its termination of the employee's employment on October 30, the employer asserted that it had a policy of requiring medical certification of an employee's need for leave within three days of the commencement of the leave. No such provision was set forth in the employer's employee handbook, in the section discussing pregnancy disability leave or elsewhere, nor was the rule ever communicated to the employee.*
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> *Moreover, such a rule could not be invoked to defeat the FEHA's pregnancy disability leave provision. "It is implicit in the statute that any notice requirement adopted by an employer must not frustrate the purposes of the Act, and must not unfairly impinge on a woman's right to take a pregnancy disability leave." Finally, the employer offered no credible explanation as to why receiving notice within three days would have been crucial to its operation.*[38]

"Certification"[39] is defined in the FEHC's Regulations as "a written communication from the health care provider" substantiating that she is disabled due to pregnancy. The certification need not be on a specific form or in a particular format, but should provide certain information:

1) The date on which the employee became disabled due to pregnancy;

2) The probable duration of the period(s) of disability; and

3) An explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of her position without undue risk to herself, the successful completion of her pregnancy, or to other persons.

Example: The employer challenged whether his female employee was actually disabled because while she was on pregnancy disability leave he observed her dining out with her family and noted that she did not appear to be "in pain." Must a woman be confined to bed or completely

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[37] Cal. Code Regs., tit. 2, §§ 7291.2, subd. (d), 7291.16.
[38] *DFEH v. William L. Snelling, dba Spaceport Inn* (2001) DFEH Dec. No. 01-05 at p. 8-9.
[39] Cal. Code Regs., tit. 2, § 7291.2, subd. (d).

incapacitated in order to be "disabled" by pregnancy, childbirth or a related medical condition as that term is defined in the FEHA? No. The fact that the employee engaged in some activities while on pregnancy disability leave did not prove that she was not "disabled" because that term "pertains to the ability of the woman to perform the same job, full-time, and under the same conditions as she did before she became disabled."[40]

The FEHC stated that "absent evidence of outright fraud, we will credit the medical opinion of a complainant's attending physician or other licensed health care practitioner on the issue of pregnancy disability."[41] *An employer which has a uniform policy of requiring certification from temporarily disabled employees to substantiate the need for leave may, if it has "good faith reasons to doubt" the validity of the certification presented by a female employee in support of a request for leave, seek clarification from the employee's health care provider.*[42]

Example: An employee worked at a hotel as the front desk manager. Her immediate supervisor was aware that she missed work because she was suffering from severe morning sickness. When her health care provider recommended that she not work until her symptoms abated, the employee advised her supervisor in person, who approved her request for leave but directed her to obtain a note from her doctor. The employer terminated employee without warning or notice, but argued that its action was justified because the certification she submitted was insufficient. Specifically, the employer contended that the physician's note did not state the duration of her leave or that she was unable to work due to pregnancy disability.

The FEHC pointed out that its Regulations state that certification supporting a request for pregnancy disability leave "should" set forth the date "on which the woman became disabled due to pregnancy, the probable duration of the period or periods of disability, and an explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of her position . . ." However, the Regulations "do[ ] not require the certification to contain each of these elements." The employer's argument was rejected.[43]

As discussed below, one of the elements of a prima facie case asserting that an employee was denied pregnancy disability leave is the fact that

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40 *DFEH v. Dimino & Card* (1990) FEHC Dec. No. 90-05 at p. 16.
41 *Id*. at p. 15.
42 *Id*. at p. 9.
43 *DFEH v. William L. Snelling, dba Spaceport Inn* (2001) FEHC Dec. No. 01-05, at p. 9.

the "employee was disabled by pregnancy."[44] Thus, when litigating such cases, DFEH bears the burden of showing that the complainant was disabled by pregnancy, childbirth or a related medical condition and, as a result, entitled to pregnancy disability leave. Among the ways this can be demonstrated is, inter alia, stipulation of the parties, testimony from the employee's healthcare provider, written documentation pertaining to the employee's request for pregnancy disability leave (including, but not limited to, the health care provider's written certification), records substantiating disability payments made to the employee and witness testimony.

b. Definition and Calculation of the Leave Period

California employers are required *by statute* to provide a maximum pregnancy disability leave period of up to four months to an employee who is disabled by pregnancy, childbirth or a related medical condition. A "reasonable period of time" is that period during which the female employee is disabled on account of pregnancy, childbirth or a related medical condition.[45] If the employee's health care provider certifies that she will be disabled for a period of less than four months, the employer need only grant leave for the period of time specified, i.e., the period of time deemed "reasonable" in light of her condition by her health care provider.

The leave period of up to four months is a "floor" or minimum requirement. Employers may implement more generous leave policies if they so choose.

Note that if the employer's policy pertaining to leave on account of temporary disability is more generous than the statutory leave entitlement guaranteed by the FEHA, leave for an employee disabled on account of pregnancy, childbirth or related medical conditions is governed by that policy. Stated differently, a woman disabled by pregnancy, childbirth or a related medical condition is entitled to the same amount of leave granted to other temporarily disabled employees, but never less than the four-month minimum set forth in the FEHA.[46]

"Four months" means the number of days the employee would normally work within a four-month period of time.[47]

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[44] Cal. Code Regs., tit. 2, § 7291.8, subd. (b).
[45] Gov. Code, § 12945, subd. (a).
[46] See Chapter entitled "California Family Rights Act (CFRA)." DFEH staff should consult with a member of DFEH's Legal Division whenever a question arises about the manner in which an employee's leave entitlement should be evaluated or calculated.
[47] Cal. Code Regs., tit. 2, § 7291.2, subd. (l).

Example: A woman works full-time, i.e., five eight-hour days per week. "Four months" means 88 working and/or paid eight-hour days of leave entitlement, based on an average of 22 working days per month over the course of a four-month period.[48]

Leave may be taken on an intermittent basis or in conjunction with a reduced work schedule when medically advisable as determined by the health care provider. If leave is taken intermittently, only the amount of leave actually taken will be counted toward the maximum allowable leave to which the employee is entitled.[49]

Example: A full-time pregnant employee misses two hours of work in the morning because she is suffering from severe morning sickness. However, she reports to work and carries out her duties for the remaining six hours of her regularly assigned shift. The employer may only charge two hours against that employee's pregnancy disability leave entitlement.

If an employee works more or less than five days per week or in accordance with an alternative work schedule, the maximum number of days of leave to which she is entitled must be calculated on a pro rata or proportional basis.

Example: An employee works "half-time." Depending on the employee's usual work schedule and how the employer defines "half-time," "four months" may mean 44 eight-hour days. Alternatively, it could mean 88 four-hour days, or the equivalent of four months of whatever the employee's normal work schedule entails.[50]

If an employee is on pregnancy disability leave during a week that includes a holiday, the week counts toward the four-month leave entitlement. But if the employer's business activity has temporarily stopped (for instance, school closes for a vacation period during the winter holidays, or a plant must close down for retooling) and employees are not expected to report to work for one or more weeks, the days that the employer's activities ceased may not be counted against the employee's pregnancy leave entitlement.[51]

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[48] Cal. Code Regs., tit. 2, § 7291.7, subd. (a)(1).
[49] Cal. Code Regs., tit. 2, §§ 7291.2, subd. (l), 7291.7, subd. (a)(2)(B), (3).
[50] Cal. Code Regs., tit. 2, § 7291.7, subd. (a)(2)(A).
[51] Cal. Code Regs., tit. 2, § 7291.7, subd. (a)(2)(C).

c. Part-Time Work During Period of Disability

A woman who is disabled by pregnancy, childbirth or a related medical condition is entitled to take leave from her employment without being subjected to pressure from her employer to continue working on a part-time basis.[52]

d. Terms of Pregnancy Disability Leave

Generally, in order to comply with Government Code section 12940, subdivision (a), by not engaging in disparate treatment of its employees, an employer must provide the same benefits, pay, medical insurance, etc., to employees on pregnancy disability leave as is provided to all other employees who take temporary disability leave. However, the FEHA and its regulations contain specific provisions regarding pregnancy disability leave that modify this general rule and clarify employers' obligations.

1) Paid Leave

Pregnancy disability leave may be paid or unpaid, depending upon the circumstances. The FEHA does not require an employer to provide paid pregnancy disability leave.[53] However, if an employer chooses to provide paid leave for non-pregnant temporarily disabled employees, the same benefit must be provided to pregnant employees.[54]

2) Accrued Time Off

"Accrued leave" is defined as "any right of an employee, accumulated over the course of his or her employment, to leave work for a period of time with monetary compensation from the employer."[55]

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[52] *DFEH v. Dimino & Card* (1990) FEHC Dec. No. 90-05 at p. 16. An employee should never be coerced by the employer to violate her healthcare provider's "explicit instructions." (*Id*. at p. 11.) The FEHC also observed: "We do not mean by this to foreclose the possibility that a woman may voluntarily wish to negotiate a part-time return to work during a period of pregnancy disability, provided it does not contravene her doctor's assessment of her disability. Such an arrangement would be entirely different from the coercive nature of respondent's claimed 'offer' of a part-time return to work here, the alternative to which was termination." (*Id*., fn. 11.)

[53] Cal. Code Regs., tit. 2, § 7291.11, subd. (a).

[54] Cal. Code Regs., tit. 2, § 7291.11, subd. (a)(1).

[55] Cal. Code Regs., tit. 2, § 7291.2, subd. (a).

a) Sick Leave

An employer may require the employee to use or the employee may elect to use any accrued sick leave during the otherwise unpaid portion of a pregnancy disability leave.[56]

b) Vacation Time and Other Accrued Time Off

An employer must permit an employee to utilize vacation time or other accrued personal time off during any otherwise unpaid portion of her pregnancy disability leave, including undifferentiated paid time off (PTO).[57]

May an employer *require* an employee to utilize accrued paid leave? The plain language of the FEHC's Regulations demonstrates that an employer may *not* require an employee to utilize accrued paid leave: "An employee may *elect, at her option*, to use any vacation time or other accrued personal time off . . . [emphasis added]."[58]

> *Example: An employer requires pregnant employees to utilize accrued vacation time during the otherwise unpaid portion of pregnancy disability leave. The employer does not have the same requirement for other employees who take temporary disability leave. The policy violates Government Code section 12940, subdivision (a), since pregnant employees are treated differently because of their sex (gender) than other similarly situated employees who take temporary disability leave.*[59]

3) Other Benefits and Seniority Accrual

During the period of pregnancy disability leave, the employee is entitled to accrual of seniority and to participate in health plans, employee benefit plans, including life, short-term and long-term disability or accident insurance, pension and retirement plans, and

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[56] Cal. Code Regs., tit. 2, § 7291.11, subd. (b)(1).
[57] Cal. Code Regs., tit. 2, § 7291.11, subd. (b)(2).
[58] Cal. Code Regs., tit. 2, § 7291.11, subd. (b)(2)
[59] See *DFEH v. Dimino & Card* (1990) FEHC Dec. No. 90-05. fn. 6 ["We also question respondent's requirement that pregnant employees use their vacation time during their six weeks of pregnancy disability leave . . . The record is silent on whether employees who suffered other temporary disabilities were subject to the same requirement, and we thus make no determination on the lawfulness of this requirement. . . . We note for the record, though, that respondent may not impose different and more onerous rules for pregnant employees than it does for other employees who are temporarily disabled."].

supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reasons other than a pregnancy disability.[60]

If an employer's policy allows for seniority to accrue while an employee is on unpaid or paid leave such as vacation or sick leave, and/or unpaid leave, a woman on pregnancy disability leave is entitled to the same seniority accrual.[61]

For purposes of layoff, recall, promotion, job assignment, and seniority-related benefits like vacation, a woman who returns from a pregnancy disability leave is entitled to return with no less seniority than when the leave commenced.[62]

With regard to health insurance benefits, if any part of the employee's pregnancy disability leave is also a FMLA leave, the employer may be obligated, under FMLA, to continue providing the employee's benefits under a "group health plan."[63]

4) Employee Status

An employee retains her status as an employee during pregnancy disability leave.

The leave does not constitute a break in service for purposes of employee benefit plans, longevity of employment or seniority under any collective bargaining agreement. When the employee returns from leave, benefits must be resumed in the same manner and at the same levels as were provided to her when the leave began. Therefore, the employer may not require an employee returning from pregnancy disability leave to undergo a physical or mental examination for the purpose of re-qualifying her for her position, subject her to a new qualification or probationary period for the purpose of being eligible to receive benefits, or impose similar restrictions/conditions.[64]

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[60] Cal. Code Regs., tit. 2, § 7291.11, subd. (c).
[61] Cal. Code Regs., tit. 2, § 7291.11, subd. (c)(1).
[62] Cal. Code Regs., tit. 2, § 7291.11, subd. (c)(2).
[63] Cal. Code Regs., tit. 2, § 7291.12, subd. (c). (See Chapter entitled "California Family Rights Act (CFRA).")
[64] Cal. Code Regs., tit. 2, § 7291.11, subd. (d).

2. Reasonable Accommodation or Transfer

a. Reasonable Accommodation

California employers and other covered entities are required to provide "reasonable accommodation for an employee for conditions related to pregnancy, childbirth or related medical conditions, if she so requests, with the advice of her health care provider."[65]

> *Example: A pregnant employee was employed as a Senior Assembler in a plant that manufactured electric cables and other parts. She was exposed to various chemicals. Her physician certified that she could continue performing the essential functions of her position if equipped with an appropriate respirator mask and gloves. The employer modified the employee's duties so as to restrict the employee's exposure to chemicals and gave her alternate duties to perform until such time as it provided her with the correct equipment. This was consistent with the employer's past practices – it had accommodated at least three non-pregnant, temporarily disabled employees, including the complainant. Therefore, the employer did not violate the FEHA by failing to reasonably accommodate the pregnant employee.*[66]

b. Transfer to Less Strenuous or Hazardous Position

The FEHA grants to a pregnant employee the right to be temporarily transferred[67] to "a less strenuous or hazardous position for the duration of her pregnancy" in two instances:

1) The employer "has a policy, practice or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees. . . for the duration of the disability . . .[if] the pregnant female employee . . . so requests."[68] In other words, an employer must comply with its own internal rule or practice that has been established through precedent, or the terms of an applicable collective bargaining agreement.

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[65] Gov. Code, § 12945, subd. (b)(1).
[66] *DFEH v. BIW Connector Systems, Inc.* (1997) FEHC Dec. No. 97-11 at p. 6.
[67] "Transfer," as that term is used throughout [the FEHC's] regulations, refers to the transfer of an employee because of pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties. (Cal. Code Regs., tit. 2, § 7291.2, subd. (q).)
[68] Gov. Code, § 12945, subd. (b)(2).

2) The pregnant employee requests a transfer for the duration of her pregnancy "with the advice of her physician, where that transfer can be reasonably accommodated." [69]

The certification indicating the medical advisability of transfer should contain:

1) The date upon which the need to transfer became medically advisable;

2) The probable duration of the period(s) of the need to transfer;

3) A statement that, due to the employee's pregnancy, the transfer is medically advisable.

Example: Due to pregnancy, a bakery/deli clerk in a large supermarket was restricted from lifting more than 10 pounds and advised by her health care provider to take periodic rest breaks. Her duties included producing various baked products, displaying products for sale, assisting customers, receiving products, and performing various cleanup tasks. The duties routinely required the employee to lift more than 10 pounds, e.g., moving 50-pound sacks of baking ingredients, emptying the trash, etc. Even though many of those tasks were usually performed by other employees, every shift required some lifting of more than 10 pounds and, at times, the employee was the only one on duty in the bakery/deli. Clerks from other departments in the store did not work in the bakery/deli and the employee was not allowed to call clerks from other departments to assist her in performing her duties. When the employee advised the supermarket of her restrictions, she was placed on leave. The FEHC found that lifting more than 10 pounds was an essential function of the position, and the employee was disabled by pregnancy. However, the supermarket did not violate the FEHA when it failed to transfer her to a less strenuous position for the duration of her pregnancy because she made no request to transfer to any other job classification.[70]

The burden is on the *employer* to prove that the transfer cannot be reasonably accommodated.[71]

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[69] Gov. Code, § 12945, subd. (b)(3).

[70] *DFEH v. Save Mart* (1992) FEHC Dec. No. 92-01. Note: It might be argued that the employee's act of advising her employer about the restrictions imposed by her treatment provider constituted a request for reasonable accommodation or transfer and imposed upon the employer an obligation to enter into the interactive process. DFEH staff should consult with a member of DFEH's Legal Division regarding the unique and specific facts of a complaint presenting this or a similar issue.

[71] Cal. Code Regs., tit. 2, § 7291.6, subd. (b).

There are limitations placed upon the employer's obligation to comply with the employee's request, however. The employee's request need not be honored if:

1) It would "require the employer to create additional employment that the employer would not otherwise have created,"[72] or

2) It would require the employer to:

   a) Discharge any employee;
   b) Transfer any employee with more seniority;
   c) Promote any employee who is not qualified to perform the job; or
   d) Violate the terms of a collective bargaining agreement. [73]

Example: A county jail employs Pre-Trial Interviewers who meet with new inmates for the purpose of reviewing their prior arrest and conviction history, asking about their medical status and history, etc. The Pre-Trial Interviewers are not sworn peace officers and do not carry weapons, nor is the room in which they conduct interviews equipped with a panic button, telephone, radio or any other device to aid them in the event of an emergency. The jail maintains a strict "no hostage" policy (i.e., the policy calls for no negotiation or bargaining with any inmate who takes an employee hostage during an uprising or altercation.) It has been the jail's policy, practice and procedure to transfer pregnant Pre-Trial Interviewers to a light duty assignment as soon as they begin to "show" without regard to whether or not a vacant position exists into which to transfer the employee for the duration of her pregnancy. The latest employee to become pregnant has asked for the same light duty assignment because she is four months pregnant and can no longer hide that fact. The jail has refused to transfer her, claiming that there is no vacant position available to which to transfer her and it is not obligated to create a position for her.

Does the jail's refusal constitute a violation of the FEHA? The answer depends on whether or not the jail has actually established a precedent by transferring other temporarily disabled employees, including pregnant employees, to light duty at times when there was no vacant position available and it was not obligated to do so under the law. Questions such as how many temporarily disabled employees have been transferred over what period of time and what positions were available at the time of the transfers will be highly relevant in conducting an investigation and determining if the FEHA has been violated.

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[72] Cal. Code Regs., tit. 2, § 7291.6, subd. (b).
[73] Cal. Code Regs., tit. 2, § 7291.6, subd. (a)(2), (b).

There are circumstances under which the employer may *require* the employee to transfer temporarily to an available alternative position:[74]

1) It is medically advisable for an employee to take intermittent leave or leave on a reduced work schedule and it is foreseeable based on planned medical treatment related to pregnancy; and

2) The alternative position has the equivalent rate of pay and benefits, although it need not have equivalent duties; and

3) The pregnant employee is qualified for the position and it better accommodates recurring periods of leave than the employee's regular position. The transfer may include altering an existing job to better accommodate the employee's need for a reduced work schedule or intermittent leave.

The employer must reinstate the pregnant employee to her same or comparable position when her health care provider certifies that there is no further medical need for the transfer, intermittent leave or reduced work schedule.[75]

H. Notice of Right to Request Pregnancy Disability Leave

California employers must notify employees of their right to request a pregnancy disability leave or transfer.[76] The specific notice requirements are as follows:

1. Notice should be posted in a conspicuous place where employees tend to congregate.

2. If the employer publishes an employee handbook in which it describes other kinds of temporary disability leaves or transfers which are available to its employees, a description of employee pregnancy disability leave or transfer rights must also be included in that handbook.

3. Additionally, the employer must give an employee a copy of this notice as soon as practicable after the employee informs the employer of her pregnancy or sooner if the employee inquires about pregnancy disability leave or transfer.[77]

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[74] Cal. Code Regs., tit. 2, § 7291.6, subd. (c).
[75] Cal. Code Regs., tit. 2, § 7291.6, subd. (d), provides that the reinstatement must comply with the requirements of section 7291.9, which sets forth the rules applicable to reinstatement from any leave or transfer due to pregnancy-related disability.
[76] Employers must also notify employees of their right to take CFRA leave (see Chapter entitled "California Family Rights Act (CFRA).")
[77] Cal. Code Regs., tit. 2, § 7291.16, subd. (a).

The FEHC's Regulations contain *minimum* notice provisions, but encourage employers to provide a copy of their policy to all new employees, assure that copies are readily available to all employees, and "disseminate the notice in any other way."[78]

1. The FEHC's Regulations contain a sample notice that may be used by employers to fulfill the statute's notice requirement. The sample sets forth the *minimum* information that must be conveyed to employees regarding their rights. Employers are free to utilize their own form or poster and provide employees with more information than is set forth in the sample.[79]

2. Employers who are subject to CFRA and whose workforce "at any facility or establishment" contains 10 percent or more persons who speak a language other than English as their primary language must translate the notice into the language(s) spoken by such group(s) of employees.[80]

I. Request for Pregnancy Disability Leave or Transfer

An employer may require an employee to give reasonable notice of the date upon which she plans to begin pregnancy disability leave and the duration of the leave.[81] Such notice may be given verbally.[82] What is *reasonable* will be a question of fact to be determined under the circumstances of the individual case.

If the need for pregnancy disability leave or transfer is foreseeable, the employee must give at least 30 days advance notice to her employer. Employees "shall consult with the employer" and "make a reasonable effort" to minimize disruption to the employer's operation when scheduling any planned medical treatment or supervision. However, the scheduling of treatment is subject to the approval of the employee's health care provider.[83]

It may be impossible for a pregnant employee to provide 30 days advance notice to her employer of her need for pregnancy disability leave or a transfer due to a lack of knowledge of the date upon which leave or a transfer will be needed, a change in circumstances or a medical emergency. In such situations, the employee is required to give her employer notice "as soon as practicable."[84] An employer may not deny leave or a transfer, under such circumstances, on the

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[78] Cal. Code Regs., tit. 2, § 7291.16, subd. (b).
[79] Cal. Code Regs., tit. 2, § 7291.16, subd. (d). Note that the Regulations include "Notice A" which is applicable to employers with less than 50 employees who are not subject to CFRA, as well as "Notice B" which is appropriate for use by employers with 50 or more employees who are subject to CFRA.
[80] Cal. Code Regs., tit. 2, § 7291.16, subd. (c).
[81] Gov. Code, § 12945, subd. (a); Cal. Code Regs. §§ 7291.8, subd. (c), 7291.10, subd. (a)(1).
[82] Cal. Code Regs., tit. 2, § 7291.10, subd. (a)(1).
[83] Cal. Code Regs., tit. 2, § 7291.10, subd. (a)(2).
[84] Cal. Code Regs., tit. 2, § 7291.10, subd. (a)(3).

ground that the employee did not provide advance notice of her need for leave or a transfer.[85]

Example: The employee was examined by her health care provider on October 26. He advised her to cease working due to hyper emesis (excessive vomiting). She notified her employer in person that very day and was instructed to follow up with written documentation from her health care provider, which was submitted on November 2. However, the employer terminated the employee on October 30 with no warning or notice. The employer argued, in part, that its action was justified because the employee failed to provide 30 days advance notice of her need for pregnancy disability leave.

The FEHC ruled that an employee is not required to provide 30 days advance notice "where such notice is not practicable, as in the case of a change in circumstances or a medical emergency. The nature of pregnancy is that emergencies and complications arise with little or no warning. In those situations, . . . notice must be given as soon as practicable." In this case, the employee gave notice the same day that her physician advised her to cease working. The notice was reasonable and practicable, in light of the circumstances.[86]

J. Employer Response to Employee Request for Pregnancy Disability Leave or Transfer

1. Notice Requirements

In addition to the FEHA's prohibition against denying pregnancy disability leave, discussed above, employers are required to observe the following requirements when responding to an employee's request for pregnancy disability leave or a transfer:

a. The employer must respond to the request as soon as practicable, but in no event later than ten calendar days after receiving the request.

   The employer shall attempt to respond before the leave begins, but once given, the employer's approval shall be deemed retroactive to the date of the first day of the leave.[87]

b. The employer must provide employees reasonable advance notice of any notice requirements it adopts. If the employer fails to give or post its employee notice requirements, it may not take any adverse action

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[85] Cal. Code Regs., tit. 2, § 7291.10, subd. (a)(4). (See also Chapter entitled "California Family Rights Act (CFRA).")

[86] *DFEH v. William L. Snelling, dba Spaceport* (2001) FEHC Dec. No. 01-05 at p. 9.

[87] Cal. Code Regs., tit. 2, § 7291.10, subd. (a)(6).

against an employee, including, but not limited to, denying her pregnancy disability leave, for failing to furnish the employer with advance notice of her need to take pregnancy disability leave.[88]

2. Medical Certification[89]

As a condition of granting a pregnancy disability leave or transfer, an employer may require medical certification setting forth the information detailed above, but only if it requires certification from other similarly situated employees.[90]

The employer may not ask the employee to provide additional information beyond that enumerated in the FEHC's Regulations.[91]

However, if the time period originally specified by the health care provider elapses or expires, the employer may require the employee to obtain and submit recertification that additional time is requested, but *only if* the employer imposes similar requirements upon other similarly situated employees.[92]

K. Medical Release to Return to Work

As a condition of the employee's return to her original duties following pregnancy disability leave or transfer, the employer may require that she obtain and submit a "return-to-work" release from her health care provider stating that she is able to resume her same job duties *only if* the employer has a uniformly applied practice or policy of requiring such releases from other similarly situated employees upon their return to work following non-pregnancy related disability leaves or transfers.[93]

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[88] The employer's notice requirement(s) may be incorporated into the general notice of employee rights which it posts and disseminates to the workforce in accordance with § 7291.16. Such incorporation will be deemed "reasonable advance notice" of the requirements the employer has adopted. (Cal. Code Regs., tit. 2 § 7291.10, subd. (a)(5).) See also Chapter entitled "California Family Rights Act (CFRA)."

[89] As discussed above, "certification" means a written communication from the healthcare provider of the employee that either the employee is disabled due to pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or to less strenuous or hazardous duties. (Cal. Code Regs., tit. 2, § 7291.2, subd. (d).) The Certification is a confidential medical record and appropriate record-keeping measures must be employed (see Chapter entitled "Disability and Medical Condition"). See also Chapter entitled "California Family Rights Act (CFRA)."

[90] Cal. Code Regs., tit. 2, § 7291.10, subd. (b).

[91] Cal. Code Regs., tit. 2, § 7291.10, subd. (b)(1).

[92] Cal. Code Regs., tit. 2, § 7291.10, subd. (b).

[93] Cal. Code Regs., tit. 2, § 7291.10, subd. (c).

L. Reinstatement Following Pregnancy Disability Leave

1. Employer's Guarantee of Reinstatement

Government Code section 12945, subdivision (a), provides that a female employee has a right, following pregnancy disability leave or transfer, to "return to work, as set forth in the Commission's Regulations," i.e., to her same position unless the employer is legally excused from doing so. The right of the female employee to be reinstated to her original duties also applies when she has been transferred to a less strenuous or hazardous position for the duration of her disability as a result of pregnancy, childbirth or related medical conditions.[94]

Upon granting an employee's request for leave or transfer, the employer must provide the employee a guarantee of reinstatement to the same position, in writing, if the employee so requests. If the employer is excused from reinstating her to the same position, it must guarantee that she shall be reinstated to a comparable position. Unless excused by an applicable affirmative defense, it is an unlawful employment practice to refuse to honor such a guarantee once it has been given.[95]

2. Date of Reinstatement

If the employee and employer agree to a definite reinstatement date, the employer must reinstate the employee, by the date agreed upon, to the same position that she held prior to taking leave or being transferred unless it is appropriate, under the circumstances, for the employer to reinstate her to a comparable position.[96]

If the reinstatement date differs from the date originally agreed upon by the employer and employee, the employer must reinstate the employee, where feasible, within two business days after the employee notifies the employer of her readiness to return to work. Again, she must be reinstated to her original position, absent circumstances allowing the employer to reinstate her to a comparable job.[97]

DFEH staff must carefully scrutinize assertions by the employer that reinstatement of the employee within two business days is/was not feasible.

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[94] Cal. Code Regs., tit. 2, § 7291.6, subd. (d).
[95] Cal. Code Regs., tit. 2, § 7291.9, subd. (a).
[96] Cal. Code Regs., tit. 2, § 7291.9, subd. (b)(1). Decisions rendered prior to issuance of the FEHC's 1995 Regulations make reference to the employee's "original" or a "substantially similar" position. Those terms were abandoned in favor of "same" and "comparable" when the FEHC revised the Regulations in 1995.
[97] Cal. Code Regs., tit. 2, § 7291.9, subd. (b)(2).

The employer should be required to provide evidentiary substantiation of any such claims.

The Regulations are silent as to the employee's right to reinstatement when the employee and employer do not agree upon a definite reinstatement date. This situation should be deemed akin to when the reinstatement date differs from the original agreed upon date, i.e., the employer should reinstate the employee within two business days, where feasible, after the employee notifies the employer of her readiness to return to work.

3. The "Same" Position

As long as the employee does not exceed the four-month pregnancy disability leave period (or the employer's more generous leave provisions),[98] the employer must reinstate the employee to the *same* job she held before commencing leave.

The "same" position is the original position an employee held before taking pregnancy disability leave, or before being temporarily transferred to another position because of pregnancy, childbirth or related medical conditions.[99] "Same" means *identical*, i.e., the employee must be reinstated to a position with the same hours, location, shift, pay, and benefits, as well as identical terms and conditions, and assignment to the same supervisor.

> *Example: An employee took pregnancy disability leave at the end of which she expected to be reinstated to her same position as a bartender working the day shift. The employer offered to reinstate the employee to a bartender position on the night shift which required her to work different hours and provided different working conditions, i.e., a faster pace and more responsibilities. The employee was not reinstated to the "same" job. The employer argued that it offered to reinstate the employee to the "same" position, i.e., that of bartender because the duties were essentially the same. The employee was not offered the "same" position due to the different shift, hours, and working conditions.*[100]

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[98] If the employee's leave period exceeds four months, the employer must treat the employee the same way vis a vis reinstatement as it treats a similarly situated employee who takes a similar length disability leave. Therefore, if other employees are reinstatement to their same position following temporary disability leave periods of more than four months, the employer must also reinstate the woman who takes a pregnancy disability leave exceeding four months. (Cal. Code Regs., tit. 2, § 7291.9, subd. (d).)

[99] Cal. Code Regs., tit. 2, § 7291.2, subd. (i).

[100] *DFEH v. Cellar Enterprises et al.* (1994) FEHC Dec. No. 94-14 at p. 8-9.

Example: An employee took pregnancy disability leave at the end of which she expected to be reinstated to her same position as a Tire Lube Express (TLE) Manager working for the Wal-Mart store in Antioch. She notified Wal-Mart of her need for and took pregnancy disability leave, but when she was ready to return to work, she was not reinstated to her management position. Instead, Wal-Mart offered her a job as a non-managerial Sales Associate in the Turlock store. As a TLE Manager, the employee oversaw sales and service, had authority to hire and fire, and supervised 10 to 15 employees. She worked at least 52 hours per week, Monday through Saturday, from 7:00 a.m. to 6:00 p.m., with later hours on Fridays. The Sales Associate position she was offered was in the domestics department with variable hours of 11:00 a.m. to 8:00 p.m. or 3:00 p.m. to 11:00 p.m. She was also advised that she could expect to work only 32 to 38 hours per week. Although she was told that she would receive the same hourly rate, she would no longer receive other compensation and benefits that she enjoyed as a manager, including a bi-weekly Geographic Assistance Allowance, guaranteed overtime, and profit-sharing. The employee's repeated requests to be reinstated to the position she held prior to taking pregnancy disability leave were unavailing.

The FEHC found that Wal-Mart violated Government Code section 12945, subdivision (b)(2), when it failed to reinstate the employee to her same position following leave.[101]

Example: Employee worked as a Rehabilitation/Chiropractic Assistant III prior to taking pregnancy disability leave. She was assigned to work in the Stockton office of a chiropractic group with a total of six Central California locations. At the conclusion of her leave, the employer attempted to force the employee to resume her duties in either the Sacramento or Modesto office whereas she lived only six blocks from the Stockton office and had arranged for childcare nearby. Her position in the Stockton office was not eliminated, but, rather, was given to another employee whose services were not discontinued upon the employee's return to work. When the employee protested her transfer to another office, the employer relented and allowed her to resume work in Stockton, but did not require the "temporary" employee to remove her belongings so that the employee could again occupy the desk that had been assigned to her before leave (or assign her to a comparable desk).

The employee's job duties were changed – she was reassigned to the position of "floater," prohibited from working at the office's front desk, frequently left with no work to perform, excluded from staff meetings, and

[101] *DFEH v. Wal-Mart Stores, Inc.* (2005) FEHC Dec. No. 05-04 at p. 8.

relegated to assisting other employees, including the one who replaced her. She was not reinstated to her same position following leave, even though her job was available, in violation of the FEHA.[102]

4. A "Comparable" Position

If the employer is legally excused from reinstating the employee to the same position at the conclusion of pregnancy disability leave, it may be required to reinstate her to a comparable position.[103]

A "comparable" position is one which is ". . . virtually identical to the employee's original position in terms of pay, benefits and working conditions.[104] The position's privileges, prerequisites, and status must also be virtually identical to the original position. It must involve the "same or substantially similar" duties and responsibilities that entail "substantially equivalent" skill, effort, responsibility and authority. The job must be performed at the "same or geographically proximate" worksite from where the employee was previously employed, during the same shift or the same or an equivalent work schedule.[105]

Example: "[The FEHC's] Regulations state that a 'substantially similar'[106] *job is one that is substantially similar in all respects, including, but not limited to, its essential duties, compensation, employee benefits, hours, opportunities for advancement and all other working conditions (citation omitted). The evidence [in the case of the bartender discussed above] demonstrated that the alternative job consisted of less hours (approximately 30 hours rather than 36 to 38 hours), a different shift (four evenings rather than four days and one evening), and different working conditions (faster pace, more inebriated clientele and more responsibilities)."*[107]

5. Release to Return to Work

Before reinstating an employee to work after a pregnancy disability leave, an employer may require the employee to submit a "return-to-work" release from her health care provider, indicating that she is able to resume her job duties. However, such verification may be required of women returning from pregnancy disability leaves only if the employer has a uniformly applied policy

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[102] *DFEH v. Maxpractice Clinic Management, Inc.* (1997) FEHC Dec. No. 97-09.
[103] Cal. Code Regs., tit, 2, § 7291.9, subd. (c)(2).
[104] Cal. Code Regs., tit. 2, § 7291.2, subd. (j).
[105] Cal. Code Regs., tit. 2, § 7291.2, subd. (j).
[106] As noted above, the Regulations previously referred to a "comparable" job as "substantially similar."
[107] *DFEH v. Cellar Enterprises et al.* (1994) FEHC Dec. No. 94-14 at p. 10.

or practice requiring the same release from other employees who return from temporary disability leaves unrelated to pregnancy.[108]

M. Affirmative Defenses

The most common affirmative defenses offered in pregnancy cases are asserted in response to an allegation that a female employee should have been reinstated to the same or a comparable job, but was not.[109] Additional affirmative defenses include "Bona Fide Occupational Qualification" (BFOQ), business necessity, and an assertion that the challenged practice is otherwise required by law.[110]

The employer asserting the affirmative defense bears the burden of establishing the applicability of the defense by a preponderance of the evidence.[111]

1. Failure to Reinstate to Same Job/Position

The employer's failure to reinstate an employee to the same job or position following a pregnancy disability leave or temporary transfer to another position is excused *only* if the employer can establish the existence of one of two affirmative defenses.

a. The employee would have lost her original position because of legitimate business reasons unrelated to her pregnancy even had she not taken pregnancy disability leave or been transferred. Stated differently, the employer bears the burden of showing that the employee "would not otherwise have been employed in her same position at the time reinstatement is requested" due to legitimate business reasons unrelated to her having taken pregnancy disability leave.[112]

> *Example: Employee was a part-time bookkeeper for an insurance brokerage firm. Employee took two pregnancy disability leaves during which time her duties were performed by temporary employees and both times was reinstated to her position at the conclusion of the leave. On both occasions, the temporary*

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[108] Cal. Code Regs., tit. 2, § 7291.10, subd. (c).
[109] Cal. Code Regs., tit. 2, § 7291.9, subd. (c).
[110] Cal. Code Regs., tit. 2, § 7286.7, subds., (a), (b), (f).
[111] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1), (c)(2); *DFEH v. J.E. Robinson, D.D.S.* (1993) FEHC Dec. No. 93-02 at p. 12.
[112] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(A). [Prior to 1995, the employer was required to show that the employee's original job ceased to exist due to legitimate business reasons unrelated to pregnancy. (1987 version of FEHC Regulations, Cal. Code Regs., tit. 2, § 7291.2, subd. (d)(3)(C)(1)(a).) The example set forth in the 1995 Regulations illustrating this affirmative defense is consistent with the elimination of a job (i.e., "such as a layoff pursuant to a plant closure"), but the language is not so limited. Therefore, the defense can encompass other reasons for failing to return the employee to the same job.]

employees left the employer's books and records in disarray, requiring a great expenditure of time and effort in order to restore them upon the employee's return to work. For a period of more than three years, the employer's Certified Public Accountant (CPA) advised the employer to discontinue its use of an outside payroll preparation service, as well as internal part-time bookkeeper in favor of the CPA performing all accounting tasks. The employer had a cash flow problem and was operating in an extremely competitive environment. The employer had been unhappy with the employee's job performance for some time, noting that she failed to produce timely and accurate profit and loss statements, balance sheets, budgets and bank statement reconciliations. She also failed to make appropriate payroll tax deposits to the State and federal authorities, causing penalties for the employer. When the employee took a third pregnancy disability leave, the employer discovered she had committed additional serious accounting errors. The CPA demonstrated to the employer that it could save a substantial sum by eradicating the employee's position and engaging the CPA to perform her duties. Thus, the employer notified the employee that because it was eliminating her position, she would not be reinstated to her employment at the end of her third leave.

She contended that the employer violated the FEHA when it refused to reinstate her to her same position. The evidence showed, however, that the employee would not have been employed in her same position at the time she requested reinstatement as a result of legitimate business reasons unrelated to the fact that she took pregnancy disability leave.[113]

Example: An employee argued that she had been subjected to pregnancy discrimination and retaliation for taking pregnancy disability leave. The employer contended that it terminated her employment as an Account Manager upon her return from pregnancy disability leave because she was not meeting sales and revenue quotas and performed poorly relative to other account managers. The employee's termination was for a legitimate, nondiscriminatory reason, as evidenced by the employer's spreadsheets showing sales figures, account manager rankings, etc. Moreover, the timing of the employer's refusal to renew her employment contract, in conjunction with her unsatisfactory performance, also constituted legitimate, nondiscriminatory reasons

[113] *DFEH v. Stone Insurance Services, Inc.* (2005) FEHC Dec. No. 99-11. (The employer was not required to return the employee to a "substantially similar job" because no such position existed.)

for her dismissal and the employee failed to show that the reasons offered by the employer were merely pretextual.[114]

Example: While the employee is on pregnancy disability leave, another employee claims the employee's original job on the basis of seniority in accordance with a provision contained in a bona fide collective bargaining agreement. The employer may legitimately return the employee to work in a different position in compliance with the collective bargaining agreement.

Example: The employee was one of two dental assistants employed by the employer prior to her commencement of pregnancy disability leave. The employer also employed two dental assistants following her leave. The employer cannot claim that the employee's position ceased to exist because the temporary employee who assumed her position while she was on leave was a "superior" employee and the employer preferred to retain the temporary employee rather than reinstate the employee who took pregnancy leave at the conclusion of that leave.[115]

b. The employee would have lost her original position because "each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently."[116]

Factors to be considered in evaluating the applicability of the defense include, but are not limited to:

1) the reliability and consistency of the employer's financial documents;
2) the employer's hiring patterns;
3) the employer's payroll records; and
4) the credibility of witness testimony.

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[114] *Smith v. Alternative Resources Corporation* (9th Cir. 2005) 128 Fed.Appx. 614. [Note: The case is an unpublished decision which may not be cited as persuasive authority before any administrative tribunal or court.]

[115] *DFEH v. J.E. Robinson, D.D.S.* (1993) FEHC Dec. No. 93-02 at p. 12.

[116] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(B). In *DFEH v. Stone Insurance Services, Inc.* (1990) FEHC Dec. No. 99-11, the employer invoked this defense in addition to arguing that it eliminated the employee's position for legitimate, nondiscriminatory business reasons. The FEHC ruled that the latter defense was applicable and left unanswered the question of whether or not the employer would have been prohibited from operating the business efficiently had it preserved the employee's position. However, the evidence discussed in the example above suggests that had the employer not asserted the first defense, the latter might have been successful.

Example: At the conclusion of pregnancy disability leave, the employee was not reinstated to the same position. The owner contended that she was not reinstated because the business was in financial trouble. In support of that assertion, the owner introduced financial documents and his own testimony, as well as that of several current employees into evidence.

The FEHC rejected the employer's attempt to invoke the defense, finding that the employer was not only still operating, but was turning a profit. In fact, while the employee was on leave, the employer hired additional employees, including his own daughter whom he paid a higher salary than the complainant had been earning. Thus, the owner's hiring patterns were "suspect" and his claims "conflicting, inconsistent, and unsupported by credible documentary evidence." The defense was unavailing.[117]

Example: While the employee, a Purchasing Manager for an original equipment manufacturer that makes IBM-compatible computers, was on pregnancy disability leave, the employer hired a permanent employee to perform many of the employee's duties such as buying supplies for a contract that affected the very survival of the employer's business. The employer sustained its burden to show that it was in a precarious financial situation and the purchasing duties taken over by the replacement employee were critical to the employer's operation and, for that reason, had to be performed competently and timely. The employer demonstrated that continuity would have been compromised were the duties transferred back to the employee at the conclusion of her leave. (For reasons unrelated to the employee's pregnancy, the employer had lost faith in her performance.) Thus, the employer could not have held the employee's position open for her without undermining the survival of the business.[118]

2. Failure to Reinstate to a Comparable Job/Position

Even if the employer sustains its burden to show that it was not obligated to reinstate the complainant to her same job following pregnancy disability leave or transfer, the employer must still reinstate the employee to a comparable

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[117] *DFEH v. Barry G Lew, M.D.* (1997) FEHC Dec. No. 97-04. The employer's contention that the complainant was not reinstated due to performance issues was equally unavailing, given that she was not disciplined in a manner consistent with the employer's personnel policies and the manner in which other employees' similar performance issues were addressed.

[118] *DFEH v. I-Bus (*1994) FEHC Dec. No. 94-03.

job/position absent the applicability of an affirmative defense. The employer bears the burden of demonstrating that the defense is viable.[119]

a. No Comparable Position Available

As discussed above, a "comparable" position is virtually identical to the employee's original position.

An employer is excused from reinstating the employee to a comparable position if none is available. A comparable position is “available” if:

1) The employee is qualified for the position or entitled to it by company policy, contract or collective bargaining agreement; and

2) The position is open on the employee’s scheduled date of reinstatement or within 10 working days thereafter; and[120]

3) The employee is qualified for the position.

Among the factors to be considered in determining whether or not a position is comparable to the employee’s original position:

1) Job descriptions for the positions in question; and

2) Whether the job descriptions accurately reflect the actual duties performed by the persons holding the positions in question.

Example: The employee was employed as a Purchasing Manager prior to taking pregnancy disability leave. Before her planned leave (coinciding with a scheduled Caesarian section birth) commenced, she had exhibited serious performance deficiencies which were noted by management. The company was under serious financial strain required by its parent organization to meet strict time deadlines or force cessation of its operations. The employee was notified two days before beginning leave that her position might be eliminated while she was off work and, thus, she likely would not be reinstated to her same position upon her return. While on leave, further performance deficiencies, some quite costly, were discovered and memorialized. The employer terminated her employment while she was on leave in order to cut costs among middle management and because the employee’s duties could be handled by other staff. The employer did not offer the employee a comparable position upon determining that she would not be reinstated to her same job. The evidence showed that the only position available was not substantially similar to the position the employee had held prior to leave.

[119] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(2).
[120] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(2)(A).

Moreover, the employee had demonstrated performance issues that negated any obligation on the employer's part to offer her the available position.[121]

b. Reinstatement of the Returning Employee to an Available Comparable Position Would Substantially Undermine the Business

To successfully invoke this defense, the employer is required to demonstrate that placing the returning employee in an available comparable position would substantially undermine the employer's ability to operate its business safely and efficiently.[122]

This defense is similar to the defense discussed above, i.e., a failure to return the employee to the same/original position because doing so would substantially undermine the operation of the employer's business. Accordingly, the same factors discussed above are relevant when analyzing the applicability of this defense.

Note that this defense may only be invoked when an employee takes pregnancy disability leave that does not qualify under FMLA under which pregnancy is deemed a "serious health condition." Federal law is, of course, a "floor" beneath which State law may never fall. Thus, an employee's right to reinstatement following pregnancy disability leave is governed by any federal law (in this case, FMLA) that provides broader protections than State law (FEHA).

Under federal law, a woman who takes a FMLA-qualifying pregnancy disability leave has an absolute right to return to her same or comparable position[123] unless she would no longer be employed had she never taken FMLA-qualifying leave. This is a rare example of an instance when FMLA will govern the employee's return since it offers broader protection. Therefore, when an employee's pregnancy disability leave qualifies as a FMLA leave, the employer must return the employee to a comparable job so long as a comparable job exists.

3. Bona Fide Occupational Qualification (BFOQ)

A BFOQ based on pregnancy is a policy or practice that, on its face, excludes women affected by pregnancy, childbirth or related medical conditions. In order to invoke this defense, the employer must show that the practice is justified because:

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[121] *DFEH v. I-Bus* (1994) FEHC Dec. No. 94-03 at p. 10-11.
[122] Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(2)(B).
[123] 29 C.F.R. § 825.214.

a. All or substantially all women affected by pregnancy, childbirth, or related medical conditions cannot safely and efficiently perform the job in question; and

b. The essence of the business would be undermined if women affected by pregnancy or related medical conditions performed the job.[124]

1) An employer must base the defense on the safety of the persons actually performing the job, not someone else, e.g., an unborn child.[125]

2) Because the effect of a BFOQ defense is class-wide discrimination, the employer's policy must be narrowly tailored to accomplish its purpose and the defense, when raised, will be likewise construed. As with other defenses, the burden is on the employer to establish the viability of the defense by a preponderance of the evidence.[126]

Example: The employer, a chiropractic practice, rescinded its offer of employment upon learning that the job candidate was pregnant. The candidate would have served as a full-time chiropractic assistant whose duties included directing patients to various rooms, performing ultrasound and sine therapy on patients, working in the examination/X-ray room, and doing light cleaning and laundry. X-rays typically took five to 15 minutes to perform. The employer had a policy of not hiring pregnant women as chiropractic assistants. Thus, upon learning of the candidate's pregnancy, the employer rescinded the job offer.

The FEHC found that the employer did not introduce evidence sufficient to show that all or substantially all pregnant women could not safely perform the job duties, including assisting with X-rays, absent harm to the fetus. The evidence showed that the employer utilized appropriate safety and precautionary measures, e.g., having the assistant leave the room when X-rays were being taken, wearing a lead apron, etc. Additionally, the employer offered no expert testimony or other credible evidence concerning the alleged threat to the employee or fetus, aside

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[124] Cal. Code Regs., tit. 2, § 7286.7, subd. (a).

[125] A battery plant had a policy of not hiring women who were able to conceive and bear children because employees were exposed to lead. The fact that some female employees may become pregnant and the exposure creates a risk of harm to their unborn children does not show that "all or substantially all" fertile female workers create such a risk. Moreover, there was evidence suggesting fetal abnormalities in the offspring of men, as well as women, but no fertile men were barred from employment under the employer's policy. Thus, the employer's BFOQ defense was rejected. (*DFEH v. Globe Battery* (1987) FEHC Dec. No. 87-19; decision affd., *Johnson Controls, Inc. v. Fair Employment & Housing Commission* (1990) 218 Cal.App.3d 517, opn. mod. 218 Cal.App.3d 1492.)

[126] *DFEH v. Globe Battery* (1987) FEHC Dec. No. 87-19.

from his own assumptions and opinions. The employer also failed to meet the second prong of the test, i.e., the essence of the business – providing chiropractic services to clients – would be undermined if pregnant women worked as chiropractic assistants. Even assuming that the duties related to X-rays were essential to the position and that the position was hazardous to a fetus, the employer could redistribute X-ray duties to a non-pregnant employee.[127]

4. Business Necessity

A business necessity defense relates to a facially neutral policy that has an adverse impact (i.e., is discriminatory in effect) on employees affected by pregnancy, childbirth or related medical conditions.

In order to successfully assert this defense, the employer bears the burden of showing:

a. There exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business;

b. The challenged practice effectively fulfills the business purpose it is supposed to serve; and

c. There exists no alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.[128]

The employer in the example discussed above, an electric cable manufacturer, attempted to assert a business necessity defense. The defense was rejected by the court, however, because the business necessity defense may only be invoked to justify policies or practices which are facially neutral. The employer's policy of not hiring women who were fertile overtly discriminated against women.[129]

Situations in which a business necessity defense might be appropriately asserted include "no transfer" policies, or "weight" policies that prohibit all employees from exceeding certain limits during any period of employment. Such policies are facially neutral. However, if the evidence demonstrated that such policy had an adverse impact on pregnant women and could not be justified by business necessity, the policy would be deemed unlawful under the FEHA.

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[127] *DFEH v. Callidac, Inc.* (1993) FEHC Dec. No. 93-03 at p. 8.
[128] Cal. Code Regs., tit. 2, § 7286.7, subd. (b).
[129] *Johnson Controls, Inc. v. Fair Employment & Housing Commission* (1990) 218 Cal.App.3d 517.

N. Sterilization

Government Code section 12945.5 prohibits employers from requiring employees – male or female – to be sterilized as a condition of employment.

O. Failure to Take All Reasonable Steps to Prevent Discrimination and Harassment from Occurring

Government Code section 12940, subdivision (k), requires employers to ". . . take all reasonable steps to prevent discrimination and harassment from occurring." Failure to comply constitutes a separate violation of the FEHA.

A fundamental part of the employer's duty entails informing pregnant employees of their right to a pregnancy disability leave or transfer, as well as the right to be reinstated to their employment following leave or transfer, as also set forth in the FEHC's Regulations, as discussed above.[130]

> *Example: A waitress took pregnancy disability leave on three occasions over the course of her employment. When she became pregnant with her fourth child, she again advised her employer of her need for leave, although at the time the leave commenced, no date for her return to work was agreed upon. The employer had no formal or written pregnancy disability leave policy, and did not require its employees to provide certification from their health care provider substantiating their need for leave or fitness to resume their duties at the conclusion of leave. The employer made no effort whatsoever to inform its employees of their right to take pregnancy disability leave and return to the same position thereafter. Moreover, the employer was unfamiliar with its obligations under the FEHA.*
>
> *The FEHC ruled that the employer violated the FEHA by failing to reinstate the employee following her fourth pregnancy disability leave. The employer also failed to take all reasonable steps to prevent discrimination from occurring as a result of its failure to educate its management and workforce about the rights and remedies inuring to employers and employees under the FEHA.*[131]

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[130] Cal. Code Regs., tit. 2, § 7291.16. Even before the FEHC's Regulations incorporate a requirement that all employers inform their employees about and post notice of their right to take pregnancy disability leave or transfer to a less strenuous or hazardous position, the FEHC interpreted Government Code section 12940, subdivision (k), to require that employers maintain pregnancy disability leave policies that conform to the FEHA. The fact that the education and posting requirement is now contained in the FEHC regulations suggests that failure to observe this requirement may be a per se violation of the requirement in Government Code section 12940, subdivision (k), that an employer "take all reasonable steps to prevent harassment and discrimination from occurring." No case has yet tested this proposition.

[131] *DFEH v. Peter Chi Ming Wong, dba Din-Ho Restaurant* (2001) FEHC Dec. No. 01-03 at p. 6.

All DFEH investigations should encompass whether the employer has in place a pregnancy disability leave policy that conforms to the requirements of the FEHA and meets the notice requirements set forth in the Regulations. Where such a workplace policy is found to be lacking, DFEH staff should inform the employer of its obligations and include in any conciliation agreement a provision that requires the employer to meet its obligations within a reasonable period of time.

P. Health Insurance Coverage for Pregnancy

The FEHA incorporates FMLA's provisions requiring continuation of health care benefits for eligible employees during the first 12 workweeks of a pregnancy disability leave.[132]

Aside from that provision, nothing in the FEHA *requires* employers to provide health insurance coverage for the medical costs of pregnancy, childbirth or related medical conditions. When analyzing allegations involving denial of health insurance, it must first be determined whether the employer is subject to FMLA, the employee is eligible for FMLA/CFRA benefits, and if the employer provides health benefits to employees who are on leave as a result of non-pregnancy-related temporary disabilities. If the employer provides health benefits to employees on leave as a result of non-pregnancy-related temporary disabilities, but no coverage for pregnancy, childbirth or related medical conditions, the employer may be engaging in disparate treatment because of sex (gender) giving rise to a claim under Government Code section 12940, subdivision (a).[133]

Q. Relationship Between the FEHA and FMLA Provisions

FMLA and its implementing regulations require employers having at least 50 employees to provide a maximum 12-week annual leave to eligible employees for their own or a family member's "serious health condition." FMLA also requires that an employee's health insurance benefits be continued during a FMLA-qualifying leave as if the employee had never taken leave for a "serious health condition."

The provisions of FMLA may become relevant to investigations of complaints filed with DFEH in a variety of ways:

1. Employers and employees are too frequently confused about the leave provisions of the State and federal statutory schemes. FMLA deems any

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[132] Cal. Code Regs., § 7291.12, subd. (c).

[133] Note that Cal. Code Regs., tit. 2, § 7291.5, subds. (a)(5) and (d), exempts "non-Title VII employers." However, that exemption was based on the prior version of Government Code section 12945 which distinguished between the obligations of employers subject to Title VII (with 15 or more employees) or "non-Title VII" employers (those with 5 to 14 employees). Those distinctions were eliminated when section 12945 was amended via AB 2870 in 2004. The FEHC has not updated its Regulations as of this writing to conform to the current version of Government Code section 12945.

period of incapacity or treatment due to pregnancy, including prenatal care, a "serious health condition." An employee's own disability due to pregnancy, childbirth or related medical conditions is not included as a "serious health condition" under CFRA.[134] Therefore, employers subject to FMLA, but not CFRA, may count the employee's pregnancy disability leave against the 12-week FMLA leave entitlement.

> *Example: When complainant sought to return to her position as a TLE manager following pregnancy disability leave, she was erroneously told by Wal-Mart management and human resources employees that she had used up all of her protected leave time provided under FMLA. The FEHC concluded that Wal-Mart's written policy in effect at the time was inaccurate and its managers in "urgent need" of training on the requirements of California law. Thus, Wal-Mart failed to take all reasonable steps to prevent discrimination from occurring.* [135]

2. Many employers erroneously believe that a pregnant employee who has already taken a FMLA-qualifying leave on account of the serious health condition of an enumerated family member is ineligible to take a protected pregnancy disability leave. However, the "maximum possible combined statutory leave entitlement for CFRA/FMLA employees for both pregnancy disability leave under FMLA and Government Code section 12945 . . . and CFRA leave for reason of the birth of the child is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy for four months and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child."[136]

   However, if the employer has a temporary disability leave policy that is more generous, i.e., for more leave time than is guaranteed under the FEHA's pregnancy and/or CFRA provisions, the employee may be entitled to take leave for pregnancy, childbirth or related medical conditions in accordance with that policy. DFEH staff should discuss the specific facts of any case involving this issue with a DFEH Legal Division Staff Counsel.

3. The FEHA provides that pregnant employees who would otherwise qualify for leave under FMLA are entitled to continue receiving health care benefits if the employer provides them pursuant to a "group health plan." "During any part of the pregnancy disability leave which is also a FMLA leave, if the employer provides health benefits under any 'group health plan,' the employer may have a FMLA obligation to continuing providing such benefits."[137]

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[134] Cal. Code Regs., tit. 2, § 7291.13, subd. (b).
[135] *DFEH v. Wal-Mart Stores Inc.* (2005) FEHC Dec. No. 05-04 at p. 9 and fn. 6.
[136] Cal. Code Regs., § 7291.13, subd. (d).
[137] Gov. Code, § 12945.2, subd. (f)(1); Cal. Code Regs., title 2, § 7291.12, subd. (c).

4. As discussed above, under federal law, a woman who takes a FMLA-qualifying pregnancy disability leave has an absolute right to return to her same or comparable position[138] unless she would no longer be employed had she never taken FMLA-qualifying leave. This is a rare example of an instance when the FMLA will govern the employee's return since it offers broader protection. Therefore, when an employee's pregnancy disability leave qualifies as a FMLA leave, the employer must return the employee to a comparable job so long as a comparable job exists.

R. Relationship Between the Pregnancy and CFRA Provisions of the FEHA

The purpose of CFRA is to assure eligible employees' right to take a leave of absence for their own serious health condition or that of their parent, spouse or child, or for the birth, adoption or foster care placement of a child. An eligible employee may take a leave of up to 12 workweeks in a 12-month period and return to his/her same or comparable job.

As noted above, the maximum *statutory* leave entitlement for employees who combine a four-month pregnancy disability leave with CFRA leave for the birth of a child or the employee's own serious health condition is four months and 12 workweeks.[139] At the end of the period of pregnancy disability, or at the end of the four-month pregnancy disability leave, whichever comes first, a CFRA-eligible employee may take a CFRA leave for 12 workweeks "for the birth of the child" (commonly referred to as "bonding leave") as long as the child has been born by that date. Thus, the woman may take CFRA leave even if she continues to be disabled by her pregnancy and even though the child does not have a serious health condition. However, her right to be reinstated to her employment following such a leave will be governed by CFRA, rather than Government Code section 12945.[140]

If an employee has taken a maximum four-month pregnancy disability leave and requires additional disability leave but has not yet given birth, a California employer *may*, but is not required to, allow the employee to take a CFRA-protected leave prior to the birth of her child.[141]

Disability because of pregnancy is not encompassed within CFRA's definition of "serious health condition." Rather, the FEHA makes clear that CFRA is separate and distinct from the protections it provides to women who are disabled because of pregnancy, childbirth or related medical conditions. Thus, eligible employees are entitled to take both pregnancy disability and CFRA leave.

See further discussion in Chapter entitled "California Family Rights Act (CFRA)."

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[138] 29 C.F.R. § 825.214.
[139] Cal. Code Regs., tit. 2, § 7291.13, subd. (d).
[140] Cal. Code Regs., tit. 2, § 7291.9, subd. (e).
[141] Cal. Code Regs., tit. 2, § 7291.13, subd. (c)(1).

ANALYTICAL OUTLINE

I. Jurisdiction

Questions to be asked include whether the respondent is an "employer" within the meaning of the FEHA.[142]

II. Elements of the Prima Facie Case of Discrimination

A. Pregnancy Discrimination

1. Did the complainant have one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition?

   Alternatively, was the complainant *perceived* by the respondent as having one of those three conditions?

2. Was the respondent an "employer" as that term is defined in the FEHA?

3. Did the respondent take adverse action (e.g., refused to hire, terminated, refused to promote or demoted) against the complainant?

4. Is there is a causal nexus between the complainant's pregnancy, childbirth or related medical condition and the adverse action taken?[143]

Relevant questions to be answered:

Identify the specific act of harm in question. Then refer to and modify, as appropriate, the list of relevant questions presented in the corresponding Chapter, e.g., Termination, Selection, etc.

B. Denial of Pregnancy Disability Leave, Reasonable Accommodation or Transfer to a Less Strenuous or Hazardous Condition

1. Did the complainant have one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition?

   Alternatively, was the complainant *perceived* by the respondent as having one of those three conditions?

2. Was the respondent an "employer" as that term is defined in the FEHA?

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[142] See Chapter entitled "Jurisdiction."

[143] The key is the "causal nexus" or "causal connection." If the complainant's pregnancy was a motivating factor in the respondent's decision to take an adverse employment action against her, the requisite connection exists. The complainant's pregnancy need not be the sole or dominant factor/motivation for the respondent's action.

3. Was the employee disabled by pregnancy? or

   Did the employee provide certification from her health care provider of her need for leave, reasonable accommodation or transfer to a less strenuous or hazardous position?

4. Was the employee's request reasonable, i.e., did it comply with the employer's applicable notice requirements and was it accompanied, where required, by a certification from the employee's health care provider?

5. Did the employer deny the employee's request?

C. Failure to Reinstate Employee to Same Position (or Comparable Position) Following Pregnancy Disability Leave or Transfer to a Less Strenuous or Hazardous Position

1. Did the complainant have one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition?

   Alternatively, was the complainant *perceived* by the respondent as having one of those three conditions?

2. Was the respondent an "employer" as that term is defined in the FEHA?

3. Was the employee granted a pregnancy disability leave or transfer to a less strenuous or hazardous position?

4. At the conclusion of the employee's pregnancy disability leave or need for transfer to a less strenuous or hazardous position, did the employer refuse to reinstate the employee to her same position?

5. Does an affirmative defense excuse the respondent's failure to reinstate the employee to the same position?

6. If an affirmative defense excuses the employer's failure to reinstate the employee to the same position, was the employer required to reinstate her to a comparable position?

7. If the employer was required to reinstate the complainant to a comparable position, did it refuse to do so?

III. Affirmative Defenses

A. Failure to Reinstate to Same Job/Position

1. Would the employee otherwise not have been employed in her same position at the time reinstatement is requested due to legitimate business reasons unrelated to her having taken pregnancy disability leave? or

2. Would the employee have lost her original position because each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently?

B. Failure to Reinstate to a Comparable Job/Position

Even if the employer sustains its burden to show that it was not obligated to reinstate the complainant to her same position following pregnancy disability leave or transfer, the employer must still reinstate the employee to a comparable job/position absent the applicability of an affirmative defense.

1. No Comparable Position Available

Can the employer demonstrate that it was legally excused from reinstating the employee to a comparable (virtually identical) position because none was available?

Was there a comparable position "available" at the time reinstatement was requested?

a. Was the employee entitled to the position by company policy, contract, or collective bargaining agreement?

b. Was the position open on the employee's scheduled date of reinstatement or within 10 working days thereafter? and

c. Was the employee qualified for the position?

2. Reinstatement of the Returning Employee to an Available Comparable Position Would Substantially Undermine the Business

Can the employer demonstrate that placing the returning employee in an available comparable position would substantially undermine the employer's ability to operate its business safely and efficiently?[144]

C. Bona Fide Occupational Qualification (BFOQ)

1. Can the employer demonstrate that all or substantially all women affected by pregnancy, childbirth or related medical conditions cannot safely and efficiently perform the job in question? and

2. Would the essence of the business be undermined if women affected by pregnancy, childbirth or related medical conditions performed the job?

D. Business Necessity

1. Can the employer demonstrate an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business?

2. Does the challenged practice effectively fulfill the business purpose it is supposed to serve? and

3. Does no alternative practice exist which would accomplish the business purpose equally well with a lesser discriminatory impact?

[144] Note that this defense may only be invoked when an employee takes pregnancy disability leave that does not qualify as leave taken pursuant to FMLA under which pregnancy is deemed a “serious health condition.”

EXPLANATION OF ANALYTICAL OUTLINE

I. Jurisdiction

See Chapter entitled "Jurisdiction."

II. Elements of the Prima Facie Case

A. Pregnancy Discrimination

1. Did the complainant have one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition?

   Alternatively, was the complainant *perceived* by the respondent as having one of those three conditions?[145]

   Evidence to be gathered/analyzed includes, but is not limited to:

   Medical records from complainant's health care provider confirming:

   a. The fact of complainant's pregnancy

   b. The date(s) upon which complainant was restricted upon the advice of her health care provider from performing some or all of the essential and/or marginal functions of her position

   c. The date(s) upon which complainant was completely disabled because of pregnancy, childbirth or related medical conditions and unable to perform the essential functions of her position with or without reasonable accommodation

   d. Notification of complainant's limitations and/or need for pregnancy disability leave was provided to the respondent

   e. The date(s) upon which such notification was provided to respondent

   Interview(s) to be conducted:

   The health care providers who have treated the complainant and/or served as consultants regarding her condition should be interviewed.

2. Was the respondent an "employer" as that term is defined in the FEHA?

[145] DFEH staff should always consult with a member of DFEH's Legal Division if there is any question as to whether or not the complainant had or was perceived to have had any of the statutorily protected conditions.

3. Did the respondent take adverse action (e.g., refused to hire, terminated, refused to promote or demoted) against the complainant?

   Relevant question to be answered:

   Did the adverse action actually occur?

   Evidence to be gathered/analyzed includes, but is not limited to:

   a. Details about the existence and character of the employment opportunity that was denied to or adverse action taken against the complainant.

   b. The experiences of incumbents performing the position.

4. Is there is a causal nexus between the complainant's pregnancy, childbirth or related medical condition and the adverse action taken?[146]

   The key is the "causal nexus" or "causal connection." If the complainant's pregnancy was a motivating factor in the respondent's decision to take an adverse employment action against her, the requisite connection exists. The complainant's pregnancy need not be the sole or dominant factor/motivation for the respondent's action. Rather, discrimination is established if a preponderance of the evidence indicates that the complainant's pregnancy, childbirth or related medical condition was at least one of the factors that motivated the employer's action.

   In some cases, the respondent will admit the causal link by stating that it denied the employment opportunity or took the adverse action "because of" the complainant's pregnancy, childbirth or related medical conditions and asserts an affirmative defense. Thus, the inquiry focuses on the sequence of events, identities, knowledge and deliberations of the decision-maker(s), etc.

   Relevant questions to be answered:

   a. Did the respondent have knowledge of complainant's pregnancy or related medical conditions or perceive the complainant to be pregnant or have related medical conditions?

[146] The key is the "causal nexus" or "causal connection." If the complainant's pregnancy was a motivating factor in the respondent's decision to take an adverse employment action against her, the requisite connection exists. The complainant's pregnancy need not be the sole or dominant factor/motivation for the respondent's action.

b. Is the respondent's asserted reason for taking the adverse action factually accurate?

c. Does the respondent's treatment of similarly situated persons indicate that complainant's pregnancy, childbirth or related medical condition(s) was a factor in respondent's decision to take the adverse action?

1) What happened to other employees who took the same action, engaged in the same behavior, etc., as complainant? Was the same decision-maker(s) involved in those matters?

2) How were other employees who were pregnant or had related medical condition(s) treated? Was the same decision-maker(s) involved in those matters?

3) How were other employees who had a non-pregnancy-related temporary disability treated? Was the same decision-maker(s) involved in those matters?

d. Does the timing of the adverse action to which complainant was subjected indicate that the complainant's pregnancy, childbirth or related medical conditions was a motivating factor in the respondent's decision-making process?

e. Is there any direct evidence linking the adverse action to which complainant was subjected to complainant's pregnancy, childbirth or related medical conditions?

f. Is there any anecdotal, inferential or circumstantial evidence linking the adverse action to which complainant was subjected to complainant's pregnancy, childbirth or related medical conditions, e.g., did the respondent treat the complainant differently after learning of her pregnancy as to the enforcement of workplace rules and policies, etc.?

B. Denial of Pregnancy Disability Leave, Reasonable Accommodation or Transfer to a Less Strenuous or Hazardous Condition

1. Did the complainant have one of three statutorily protected conditions: pregnancy, childbirth or a related medical condition?

   Alternatively, was the complainant *perceived* by the respondent as having one of those three conditions?

Relevant questions to be answered / evidence to be gathered:

See above.

2. Was the respondent an “employer” as that term is defined in the FEHA?

3. Was the employee disabled by pregnancy? or

   Did the employee provide certification from her health care provider of her need for leave, reasonable accommodation or transfer to a less strenuous or hazardous position?

   Relevant questions to be answered:

   a. What are the essential functions of the position in question?

   b. What are the particular physical or mental requirements of the job in question, including the physical layout of the work station/environment?

   c. Does the medical evidence establish that the complainant was disabled (unable to perform the essential functions of her position with or without reasonable accommodation) because of pregnancy, childbirth or related medical conditions at the time of the denial of leave; or

      Was able to perform the essential functions of her position with reasonable accommodation; or

      It was medically advisable that she be transferred to a less strenuous or hazardous position for the duration of her pregnancy?

   Evidence to be gathered/analyzed includes, but is not limited to:

   a. Job descriptions

   b. Duty statements

   c. Job function analyses

   d. Complainant’s medical records from her health care provider(s)

   Interviews to be conducted:

   The treating physician should be interviewed to ascertain:

a. Upon what information (oral and documentary – from any source) did the treating physician rely when making a determination that the complainant could or could not perform the essential functions of her position or that she required a reasonable accommodation to perform the essential functions or that a transfer to a less strenuous or hazardous position was medically advisable?

b. For instance, did he/she have a copy of and review the relevant duty statement, job description, job analysis or other pertinent documents outlining the job requirements? Did he/she discuss the job requirements with the complainant and/or a representative of the respondent?

c. Did he/she rely on any written or unwritten medical standard or policy, e.g., Peace Officer Standards Training (POST) standards?

d. What information, if any, did the health care provider communicate to the respondent? Orally or in writing? (Obtain all documents.)

<u>In evaluating medical evidence, consider</u>:

a. The testimony of a board certified specialist will usually carry more weight than that of a general practitioner.

b. Testimony and documentary evidence gathered from a health care provider who examined the complainant and was fully versed in the essential functions and physical or mental requirements of the position in question will be deemed more reliable and given greater weight than testimony from a health care provider who did not examine the complainant and/or was not fully versed in the essential functions and physical or mental requirements of the position in question. Stated differently, the more speculative the physician's opinion, the lesser weight it will be given.

4. Was the employee's request reasonable, i.e., did it comply with the employer's applicable notice requirements and was it accompanied, where required, by a certification from the employee's health care provider?

<u>Relevant questions to be answered</u>:

Did the respondent have in place at the time of complainant's request a policy, practice or collective bargaining agreement setting forth notice and/or certification requirements that were applicable to complainant?

a. If “yes:”

1) Was the complainant aware of the respondent’s policy, practice or collective bargaining agreement setting forth notice and/or certification requirements?

2) Did the complainant comply with the respondent’s policy, practice or collective bargaining agreement setting forth notice and/or certification requirements?

b. If “no:”

1) How did complainant communicate her request for leave, reasonable accommodation or transfer to respondent?

2) When did complainant communicate her request for leave, reasonable accommodation or transfer to respondent?

3) Did complainant provide respondent with certification from her health care provider of her need for leave, reasonable accommodation or transfer?

4) When and by what means did complainant provide respondent with certification from her health care provider of her need for leave, reasonable accommodation or transfer?

5. Did the employer deny the employee’s request?

Relevant questions to be answered:

a. Did the respondent actually refuse to grant the complainant’s request for pregnancy disability leave, a reasonable accommodation or transfer to a less strenuous or hazardous position for the duration of her pregnancy?

b. Did the respondent have a policy, practice or collective bargaining agreement that authorized granting leave to a non-pregnant temporarily disabled employee for the duration of the employee’s disability?

c. Did the respondent have a policy, practice or collective bargaining agreement that authorized granting a reasonable accommodation to a non-pregnant temporarily disabled employee for the duration of the employee’s disability?

d. Did the respondent have a policy, practice or collective bargaining agreement that authorized the transfer of a non-pregnant temporarily disabled employee to a less strenuous or hazardous position for the duration of the employee's disability?

e. If the respondent had no policy, practice or collective bargaining agreement authorizing leave, the grant of a reasonable accommodation or transfer to a less strenuous or hazardous position to non-pregnant temporarily disabled employees, could the respondent have granted the complainant's request for leave, reasonable accommodation or transfer?

f. What are the essential functions of the position in question?

g. What are the particularized physical requirements of the job in question, including the physical layout of the work station/environment?

h. Does the medical evidence establish that the complainant was unable to perform the essential functions of the position at the time of the denial?

Evidence to be gathered/analyzed:

a. Job descriptions

b. Duty statements

c. Job function analyses

d. Complainant's medical records (see above)

e. A copy of the respondent's workplace policy and substantiation that it was posted in the workplace

f. Documentation pertaining to the interactive process, including but not limited to:

    1) All forms of accommodations considered and rejected by respondent and/or complainant

    2) The nature and cost of all forms of accommodations considered and rejected by the respondent

    3) The overall financial resources of the facilities involved in providing the accommodation

4) The number of individuals employed at the facility

5) The impact of the accommodation on the operation of the facility, or the impact of the expenses and resources

6) The overall financial resources of the respondent and overall size of the business in light of the number of employees, and number, type and locations of its facilities

7) The type of operation maintained by the respondent entity, including the composition, structure and functions of the workforce

8) The geographic separateness and administrative or fiscal relationship of the facility or facilities.

6. No affirmative defense excuses the respondent's conduct.

See discussion below.

C. Failure to Reinstate Employee to Same Position (or Comparable Position) Following Pregnancy Disability Leave or Transfer to a Less Strenuous or Hazardous Position

Would the employee otherwise not have been employed in her same position at the time reinstatement is requested due to legitimate business reasons unrelated to her having taken pregnancy disability leave? or

Would the employee have lost her original position because each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently?

III. Affirmative Defenses

A. Failure to Reinstate to Same Job/Position

1. The employee would not otherwise have been employed in her same position at the time reinstatement is requested due to legitimate business reasons unrelated to her having taken pregnancy disability leave.

Relevant questions to be answered:

a. Did the adverse action occur? Stated differently, did respondent fail to reinstate the complainant to the same job/position after complainant took pregnancy disability leave?

b. Would the complainant have lost her position for legitimate business reasons unrelated to her pregnancy, even if she had not taken a pregnancy disability leave?

1) Is the respondent's asserted reason for the loss of the complainant's job factually accurate?

2) Did any other employees lose their positions for the same asserted reasons that complainant lost her job?

3) Were any other employees' positions eliminated at the same time that complainant's job was eliminated?

4) Does any evidence suggest that the complainant would still be employed in her same position had she never taken a pregnancy disability leave? or

2. The employee would have lost her original position because each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently.

Relevant questions to be answered:

a. Is there any evidence that the respondent attempted to preserve the complainant's job so that she could return to it at the conclusion of her pregnancy disability leave?

b. Is respondent's asserted reasons for its inability to preserve complainant's job for her factually accurate?

c. Is there any evidence that respondent has preserved the job for similarly situated non-pregnant employees who took leave?

d. What evidence indicates that preserving the job for the complainant would have substantially undermined the respondent's ability to operate the business safely and efficiently?

3. Did the respondent provide the complainant with a comparable job?

   Relevant questions to be answered:

   Does the evidence indicate that the job provided to complainant upon the conclusion of her pregnancy disability leave is truly "comparable" to the position she held before taking leave? In other words, is the job provided to complainant "virtually identical" to the job she held before taking leave?

B. Failure to Reinstate to a Comparable Job/Position

Even if the employer sustains its burden to show that it was not obligated to reinstate the complainant to her same job following pregnancy disability leave or transfer, the employer must still reinstate the employee to a comparable job/position absent the applicability of an affirmative defense.

1. No Comparable Position Available

An employer is excused from reinstating the employee to a comparable (virtually identical) position if none is available.

A comparable position is "available" if:

a. The employee is qualified for the position or entitled to it by company policy, contract or collective bargaining agreement;

b. The position is open on the employee's scheduled date of reinstatement or within 10 working days thereafter; and

c. The employee is qualified for the position.

Relevant questions to be answered:

Does the evidence indicate that there was no comparable job available on the complainant's scheduled date of reinstatement or within 10 working days thereafter?

a. Does the evidence indicate that respondent actually explored whether or not a comparable position was available?

b. Does the evidence support respondent's assertion that no comparable job was available?

2. Reinstatement of the Returning Employee to an Available Comparable Position Would Substantially Undermine the Business

The employer must demonstrate that placing the returning employee in an available comparable position would substantially undermine the employer's ability to operate its business safely and efficiently.

Note that this defense may only be invoked when an employee takes pregnancy disability leave that does not qualify as leave taken pursuant to FMLA under which pregnancy is deemed a “serious health condition.”

Relevant questions to be answered:

a. Does the evidence indicate that a comparable job was available, but placing the complainant in that position would substantially undermine the respondent’s ability to operate the business safely and efficiently?

b. Does the evidence indicate that the respondent also failed to return other employees who took leave because of temporary disabilities other than pregnancy, childbirth or related medical conditions to available comparable positions on the ground that to do so would undermine its ability to operate the business safely and efficiently?

C. Bona Fide Occupational Qualification (BFOQ)

1. All or substantially all women affected by pregnancy, childbirth or related medical conditions cannot safely and efficiently perform the job in question.

   Relevant questions to be answered:

   Does the respondent assert that all or substantially all women who are pregnant or have a related medical conditions would be unable to safely and efficiently perform the essential functions of the position in question?

   If so, the respondent must demonstrate that “all or substantially” all such individuals cannot perform the essential functions of the position in question; and

2. The essence of the business would be undermined if women affected by pregnancy or related medical conditions performed the job.

Relevant questions to be answered:

Does the respondent assert that the essence of the business would be undermined if women who are pregnant or have a related medical conditions performed the essential functions of the position in question?

If so, the respondent must demonstrate that "all or substantially" all such individuals cannot perform the essential functions of the position in question without undermining the essence of the business.

Evidence to be gathered/reviewed includes:

a. Medical documentation, if any, demonstrating that all or substantially all women who are pregnant or have a related medical conditions are unable to perform the essential functions of the position in question safely and efficiently, i.e. without posing a danger to herself or others.

b. Did respondent's doctors rely upon any medical studies or industrial studies when devising and implementing the medical standard at issue?

    1) If so, what do the studies reveal about respondent's claim(s)?

    2) Do they specifically address pregnancy and/or complainant's related medical conditions and/or the particular job in question?

c. Does complainant's medical and/or work history support the respondent's contention that she cannot safely and efficiently perform the essential duties of the position in question? Particularly relevant will be any evidence that complainant has performed the same duties or in the same position during previous pregnancies or when experiencing the same related medical conditions, whether while employed by this respondent or another employer.

d. Is the respondent's claim that the BFOQ is reasonably necessary to the essence of its business factually accurate?

    Even if the respondent demonstrates that all or substantially all women who are pregnant or have the same related medical conditions as complainant would be unable to safely and efficiently perform the essential duties of the position in question, the inquiry does not stop there. The respondent must also demonstrate that the BFOQ is "reasonably necessary" to the essence of the business, i.e., that the "essence" (essential purpose or principal

function) of the respondent's business would be undermined if the respondent did not enforce the exclusionary policy/BFOQ.

D. Business Necessity

1. There exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business;

2. The challenged practice effectively fulfills the business purpose it is supposed to serve; and

3. There exists no alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact.

   Relevant questions to be answered:

   a. What does respondent assert is the underlying purpose of the challenged business practice?

   b. Is the challenged business practice equally applicable to all persons? Stated differently, is the challenged business practice facially neutral?

   c. Even if the challenged business practice is facially neutral, does it have the effect, in practice, of having a disproportionate adverse impact upon women who are pregnant or have medical conditions related to pregnancy?

   d. If the challenged business practice has the effect, in practice, of having a disproportionate adverse impact upon women who are pregnant or have medical conditions related to pregnancy, is there another business practice that can be implemented by the respondent that will fulfills the stated legitimate business practice and eliminate the disproportionate adverse impact?